D.T.E. 01-21 May 25, 2001

Investigation by the Department of Telecommunications and Energy on its own motion commencing a rulemaking pursuant to 220 C.M.R. § 2.00 et seq., revising the billing procedures for calculating a residential rental property owner's responsibility in non-minimal use sanitary code violations, as set forth in 220 C.M.R. §§ 29.00 et seq.

ORDER INSTITUTING RULEMAKING

I. INTRODUCTION

Pursuant to G.L. c. 164 § 76C, the Department of Telecommunications and Energy ("Department") opens a rulemaking for the purpose of revising billing procedures implemented by electric and gas companies when billing a residential rental property owner cited for violation of 105 C.M.R. §§ 410.354 and/or 410.254 of the State Sanitary Code ("Code").[(1)] The Code requires that, if a residential tenant is responsible for paying for electricity or gas, the property owner must ensure that the meter serving the tenant's dwelling unit registers only the energy consumption of that dwelling unit. The Department's billing procedures for Code violations, contained in 220 C.M.R. §§ 29.00 et seq. ("Section 29"), provide that a residential property owner cited for a non-minimal use[(2)] violation of the Code shall be re-billed for the full amount previously billed to a tenant customer for electric and/or gas service during the existence of the Code violation. Section 29 limits retroactive billing of the property owner to a maximum of two years. The proposed regulations set forth in this rulemaking further limit the cost to the property

owner by providing that the utility shall calculate the amount of the property owner's retroactive responsibility based upon electric or gas usage actually attributable to the Code violation.

II. BACKGROUND

The Department adopted Section 29, entitled "Billing Procedures for Residential Rental Property Owners Cited for Violation of the State Sanitary Code 105 C.M.R. 410.354 or 105 C.M.R. 410.254" ("Sections 410.354 and 410.254"), in its final order in Sanitary Code Rulemaking, D.P.U. 90-280 (1994). The Department's regulations[(3)] implement the requirements of Sections 410.354[(4)] and 410.254[(5)] and contain procedures that allow electric and gas companies to re-bill owners of residential rental property for past utility service improperly billed to tenant customers when a certified violation of the Code, pertaining to electric and/or gas metering, existed during the occupancy of the tenant customer. 220 C.M.R. § 29.01.

The procedures set forth in Section 29 require a tenant customer to provide a copy of a Sanitary Code citation to the utility company within 60 days of receipt. 220 C.M.R. § 29.05(2). Upon receiving a copy of the citation, the utility company shall: (1) determine whether the violation involves minimal or non-minimal use; (2) determine the property owner's responsibility based on the cost of service to the tenant customer during the time period of the Code violation's existence, not to exceed two years; (3) place in escrow the amount previously billed the tenant customer for the appropriate time period; and (4) transfer the account for utility service to the dwelling unit from the tenant's name to the property owner's name. 220 C.M.R. § 29.06. The utility company must notify in writing both the property owner and tenant customer of these actions and the amount and time period of the property owner's responsibility within 30 days of receipt of the Sanitary Code citation. 220 C.M.R. §§ 29.06(2), (3). The property owner is then responsible for paying for electric or gas service provided to the tenant customer until the effective date of correction of the Code violation. 220 C.M.R. § 29.06(3)(d).

Either the property owner or tenant customer may dispute the dollar amount and/or time period of the property owner's responsibility, or may dispute the classification of a violation as minimal use, by contacting the Department's Consumer Division within 60 days of the utility company's written notice. 220 C.M.R. §§ 29.06(2)(d), (3)(g); 29.08(2); 29.09(1). Section 29 provides that the Consumer Division investigate and make findings, and that upon notification of the findings, the utility company, property owner, or tenant customer may request an informal hearing before the Consumer Division. 220 C.M.R. § 29.09. If dissatisfied with the informal decision, a party may then request a formal hearing pursuant to G.L. c. 30A within 14 days. 220 C.M.R. § 29.09(3).

The utility company must hold in escrow the amount of the property owner's responsibility for the Code violation until it can refund such amount to the tenant customer within 30 days of the expiration of any dispute or appeal period provided in Section 29, or within 30 days of a final adjudicatory decision by the Commission of the Department. 220 C.M.R. §§ 29.06(d), 29.10.

III. PROPOSED REGULATIONS

With this Order the Department proposes to revise billing procedures pertaining to calculation of the amount of a residential rental property owner's responsibility in non-minimal use Code violations, as set forth in 220 C.M.R. § 29.07 ("Section 29.07"). A copy of the proposed regulation is attached.

The current Section 29.07 includes procedures for determining the retroactive time period as well as the amount of the property owner's liability for electric or gas usage improperly billed to the tenant customer as a result of a Code violation. The utility company re-bills that amount to the property owner and refunds it to the tenant customer after an opportunity for either party to dispute the amount. 220 C.M.R. §§ 29.09, 29.10. The company determines the retroactive time period for billing the property owner by: calculating back two years from the effective date of the citation; referencing back to the date the tenant customer became the customer of record at the dwelling unit subject to the violation; or reviewing billing history to determine the approximate date of the commencement of the violation, whichever time period is shortest. 220 C.M.R. § 29.07(1).

The current regulations provide that the amount of the property owner's responsibility for electric or gas service to the dwelling unit subject to the violation is the amount previously billed to the tenant customer for the service during the time period established pursuant to Section 29.07(1). 220 C.M.R. § 29.07(2)(a). The property owner also is responsible for electric or gas service to the dwelling unit from the effective date of the citation to the effective date of correction of the violation. 220 C.M.R. § 29.07(2)(b). The Department may grant an exception to any provision of Section 29, including calculation of the amount of the property owner's responsibility, pursuant to a waiver provision in 220 C.M.R. § 29.13. See Moruzzi, Mo-Del Landscape Inc. v. Commonwealth Gas Company, D.P.U./D.T.E. 96-AD-6 (2001) ("Moruzzi").

The Department proposes to revise Section 29.07(2) to provide that the utility company apportion the bill for the retroactive period of the Code violation. Under the revised regulation, the property owner is responsible for paying only for usage attributable to appliances, outlets or other energy consumption sources cited as wrongfully connected to the meter serving the tenant customer's dwelling unit, rather than the full cost of the tenant's electric or gas usage. The tenant customer is thus responsible for the portion of the bill attributable to usage of appliances in the dwelling unit properly connected to the meter.

The revision requires utility companies to calculate the amount of the property owner's responsibility by determining the cost of operating the appliances or service improperly connected to the meter that is the subject of the violation. Such determination may be based on industry standards for the appliances in question, i.e., average kilowatt-hour or therm usage; typical usage patterns; an analysis of billing patterns; or other reasonable method devised by the company. The company must explain the method used when it informs the property owner and tenant customer of the property owner's responsibility

pursuant to 220 C.M.R. § 29.06. The utility company shall bill the property owner for the amount so calculated for the time period determined pursuant to Section 29.07(1).

In promulgating the billing procedures in Section 29, the Department noted that the Code is not intended to unduly penalize a residential rental property owner for violation of the Code or to unduly profit a tenant customer who was responsible for electric or gas service delivered exclusively to the tenant customer's dwelling unit. Order Initiating Sanitary Code Rulemaking, D.P.U. 90-280, at 7 (1994); Moruzzi at 12. See also Santana v. Boston Edison Company, D.P.U. 90-21-I (1992); Shimo v. Boston Edison Company, D.P.U. 90-3-I (1992); Commonwealth v. Haddad, 364 Mass. 795, 799 (1974) (primary purpose of the Code is to prevent violations). The purpose of the relevant Code provisions is to prevent tenants from being held liable for payment of electricity or gas for which they did not subscribe, or for which the Code designates the owner as the responsible party. Cabot, Bard Realty Trust v. Massachusetts Electric Company, D.P.U. 92-AD-53, at 14 (1994). The Department finds that calculation of a property owner's responsibility for non-minimal use Sanitary Code violations pursuant to the current Section 29.07(2) may in some instances result in an unjust penalty for the property owner and undue enrichment of the tenant customer. See Moruzzi at 12-13. The property owner's retroactive liability for a tenant customer's entire utility bill for up to two years allows a tenant to avoid payment for the portion of the electricity or gas service for which the tenant did subscribe and ordinarily would be responsible.

In adopting the minimal use provision, the Department determined that apportionment of bills for utility service provided during Code violations was appropriate in a number of specified instances. See Sanitary Code Rulemaking, D.P.U. 90-280, at 5. In Moruzzi, the Department applied the waiver provision in 220 C.M.R. § 29.13 to apportion a bill for electric or gas service during a non-minimal Code violation between a tenant and a property owner. See Moruzzi at 12-13. The proposed revisions to Section 29.07(2) provide an equitable solution for non-minimal use Code violations by articulating this practice of bill apportionment already employed by the Department in appropriate cases. The proposed regulations do not change procedures for determining the time period of the property owner's responsibility in Section 29.07(1), nor do they affect the current process whereby, subsequent to the Code citation, the property owner becomes the customer of record for electric or gas service to the dwelling unit until the violation is corrected. 220 C.M.R. § 29.06.

Dispute and hearing procedures set forth in Section 29 also would not change under the revised regulations. The proposed regulations contain a provision allowing the property owner or tenant customer to dispute the utility company's calculation of the property owner's responsibility, and to present alternative calculations, by contacting the Department's Consumer Division pursuant to 220 C.M.R. §§ 29.06(2)(d), 29.06(3)(g) and 29.09(1) within 60 days of the company's written notice. Most importantly, the proposed regulation does not overstep the Department's jurisdiction by addressing the validity of the underlying Code violation. That determination continues to be the purview of the certifying agency.[(6)]

IV. SOLICITATION OF COMMENTS

The Department seeks initial written comments on these proposed revisions to 220 C.M.R. §§ 29.00 et seq. no later than 5:00 p.m. on June 22, 2001, and reply comments no later than 5:00 p.m. on July 3, 2001. Written comments shall be limited in length to a maximum of 20 one-sided, double-spaced typewritten pages. Initial and reply comments should be filed with Mary L.Cottrell, Secretary, Department of Telecommunications and Energy, One South Station, 2nd Floor, Boston, Massachusetts 02110. All written pleadings or comments must also be submitted to the Department in electronic format using one of the following methods: (1) by e-mail attachment to dte.efiling@state.ma.us, cc: Hearing Officer at marcella.hickey@state.ma.us; or (2) on a 3.5" floppy diskette, IBM-compatible format. The text of the e-mail or the diskette label must specify: (1) an easily identifiable case caption; (2) docket number; (3) name of the person or company submitting the filing, and (4) a brief descriptive title of document (e.g., comments or petition to intervene). The electronic filing should also include the name, title and phone number of a person to contact in the event of questions about the filing. Text responses should be written in either Word Perfect (naming the document with a ".wpd" suffix) or in Microsoft Word (naming the document with a ".doc" suffix). Data or spreadsheet responses should be compatible with Microsoft Excel. Documents submitted in electronic format will be posted on the Department's Website (http://www.state.ma.us/dpu/).

To provide further opportunity for comment, and pursuant to G.L. c. 30A, §§ 2 and 4, and 220 C.M.R. § 2.05, the Department will hold a public hearing on June 26, 2001, at

10:00 a.m., at the Department's offices, One South Station, Boston, Massachusetts. Interested persons may present facts, opinions, or arguments relating to the proposed regulations at the public hearing.

Persons commenting at the public hearing or submitting written comments are requested to address the feasibility and potential means of determining the electric and gas usage of the appliances, outlets or other energy consumption sources that are the subject of Code violation, and the method of calculating the cost of that usage to be billed to the property owner under Section 29.

The effective date of the revised regulations shall be the date of their final publication in the Massachusetts Register.

By Order of the Department,

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James Connelly, Chairman

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W. Robert Keating, Commissioner

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Paul B. Vasington, Commissioner

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Eugene J. Sullivan, Jr., Commissioner

_____Deirdre K. Manning, Commissioner

D.T.E. 00-21 Appendix A

Provisions of the State Sanitary Code pertaining to metering of electricity and gas in multi-dwelling unit buildings occupied by residential tenants

DEPARTMENT OF PUBLIC HEALTH

105 CMR 410.000: MINIMUM STANDARDS OF FITNESS FOR HUMAN HABITATION (STATE SANITARY CODE, CHAPTER II)

410.354: Metering of Electricity and Gas

(A) The owner shall provide the electricity and gas used in each dwelling unit unless

(1) Such gas or electricity is metered through a meter which serves only the dwelling unit or other area under the exclusive use of an occupant of that dwelling unit, except as allowed by 105 CMR 410.254(B); and

(2) A written letting agreement provides for payment by the occupant.

(B) If the owner is required, by 105 CMR 410.000 or by a written letting agreement consistent with 105 CMR 410.000, to pay for the electricity or gas used in a dwelling unit, then such electricity or gas may be metered through meters which serve more than one dwelling unit.

(C) If the owner is not required to pay for the electricity or gas used in a dwelling unit, then the owner shall install and maintain wiring and piping so that any such electricity or gas used in the dwelling unit is metered through meters which serve only such dwelling unit, except as allowed by 105 CMR 410.254(B).

410.254: Light in Passageways, Hallways, and Stairways

(A) Except as allowed in 105 CMR 410.254(B), the owner shall provide light 24 hours per day so that illumination alone or in conjunction with natural lighting shall be at least one foot candle as measured at floor level, in every part of all interior passageways, hallways, foyers and stairways used or intended for use by the occupants of more than one dwelling unit or rooming unit:

(B) In a dwelling containing three or fewer dwelling units, the light fixtures used to illuminate a common hallway, passageway, foyer and/or stairway may be wired to the electric service serving an adjacent dwelling unit provided that if the occupant of such dwelling unit is responsible for paying for the electric service to such dwelling unit:

(1) a written agreement shall state that the occupant is responsible for paying for light in the common hallway, passageway, foyer and/or stairway; and

(2) the owner shall notify the occupants of the other dwelling units.

1. The Sanitary Code regulations of the Department of Public Health, 105 C.M.R. §§ 410.000 et seq., establish the "Minimum Standards of Fitness for Human Habitation" applicable to every owner-occupied or rented dwelling in Massachusetts that is used for living, sleeping, cooking and eating. Local boards of health have the primary responsibility for enforcement of the Code.

2. Minimal use violations are defined in 220 C.M.R. § 29.08(1) as Code violations involving common area illumination or electrical outlets; smoke, fire and/or security

alarms; door bells; and cooking ranges. Section 29.08 excludes from the minimal use category violations involving heating, air conditioning, hot water heating, electrical pumps, clothes dryers, refrigerators or freezers. For minimal use violations, the utility re-bills the property owner ten dollars per month for the applicable time period. 220 C.M.R. § 29.08(1). The Department does not propose in this proceeding to revise any provisions of Section 29 pertaining to minimal use violations.

3. The Department has jurisdiction to enforce Code Sections 410.354 and 410.254, because no substantive or jurisdictional conflict exists between the Department's authority and the authority of the certifying agency which makes a finding whether a Code violation exists. Fink v. Boston Edison Company, D.P.U. 95-AD-4, at 9 (1995) ("Fink"); Folloni v. Eastern Edison Company, D.P.U. 92-AD-45, at 9 (1994); Eastern Edison Company v. Prybuszauckas, D.P.U. 84-86-64, at 5 (1985).

4. 105 C.M.R. § 410.354 provides that the owner of a residential rental building must pay for the electricity or gas used in each dwelling unit when the electricity or gas use is not measured by a single meter that serves only the dwelling unit (see Appendix A for full text of the regulation). Any contractual arrangement between the landlord and tenant for utility service, i.e., a lease agreement, is superseded by the landlord's warranty that rental units are in compliance with the Code. Fink at 10; Cahill v. Boston Edison Company, D.P.U. 88-AD-6, at 7 (1990) ("Cahill"); Eastern Edison Company v. MacDonald, D.P.U. 84-86-59, at 5 (1985).

5. 105 C.M.R. § 410.254 contains the following exception to Section 410.354 for buildings with three or fewer dwelling units: light fixtures used to illuminate a common area may be wired to the electric service serving a dwelling unit, provided that if the occupant of such unit is responsible for paying for the electric service to the unit, a written agreement shall state that the occupant is responsible for paying for light in the common area (see Appendix A for full text of the regulation).

6. The Department will not re-litigate the facts underlying a finding of a Code violation but will accept documentation by a certifying agency (i.e., local board of health or other state, city or town agency mandated to enforce the Sanitary Code) as probative evidence of the violation. McDonald v. Boston Edison Company, D.P.U. 91-AD-34, at 13-15 (1994); Cahill at 5-6. Section 29 provides that "a citation issued by a Certifying Agency to the property owner shall be presumed accurate and the accuracy of the citation shall not be contested before the Department." 220 C.M.R. § 29.04(1).